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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DANIEL R. DE NARDO,

APPELLANT,

VS.

WILLIAM COOK, ET AL.,

APPELLEES.

APPEAL FROM THE NINTH CIRCUIT COURT OF APPEALS

JURISDICTIONAL STATEMENT

DANIEL R. DE NARDO
P.O. BOX 100682
ANCHORAGE, ALASKA
99510

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QUESTIONS PRESENTED

NO. 1

Can a court recognized indigent be imprisoned for an indefinite term under a charge for indirect criminal contempt: Because the indigent could not post a supersedeas bond for a civil infraction before trial: When the state statute declares that the infraction is not a criminal offense; may not result in imprisonment; nor is the fine considered a penal or criminal punishment?

NO. 2

Is a limited jurisdiction state magistrate liable under the Civil Rights Act when he acts in direct violation of the statutes limiting his jurisdiction?

NO. 3

What state decisions are applied in the federal courts under Erie Railroad:

A. the decision of a lower court:

OR

B. the decisions of the state supreme court that directly overrule the lower court?

PARTIES

1. Daniel R. DeNardo
2. William Cook
3. Ronald Wielkopolski
4. J. Whitener
5. R. Hecker
6. J. Stirling
7. D.G. Smith
8. L. Goe
9. Brian S. Porter
10. Municipality of Anchorage

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OPINIONS BELOW

Mr. DeNardo filed a Civil Rights Action. The Federal District Court entered final judgment on 12 September, 1984.

The Ninth Circuit Court of Appeals affirmed without an opinion on 12 August, 1985.

Both of the opinions are unpublished.

JURISDICTION

Mr. DeNardo's Civil Rights Action challenged the Constitutionality of the state statutes that the defendants acted under in depriving Mr. DeNardo of Due Process and Equal Protection of the Law.

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1257(2); or in the alternative as a Petition for Certiorari under 28 U.S.C. §1254.

UNITED STATES CONSTITUTION

ARTICLE XIV

§ 1. Citizenship rights not to be abridged by states.

All persons born or natrualized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liverty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

ALASKA STATE CONSTITUTION

Section 5. Oath of Office.

All public officers, before entering upon the duties of their offices, shall take and subscribe to the following oath or affirmation: "I do solemnly swear

(or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of Alaska, and that I will faithfully discharge my duties as_____to the best of my ability." The legislature may presecrbe further oaths or affirmations.

ALASKA STATE STATUTES

Section 1.10.050. Definitions. In the laws of the state, unless the context otherwise requires,

(6) "peace officer" means any officer of the state troopers, members of the police force of any incorporated city or borough, United States marshals and their deputies, and other officers whose duty it is to enforce and preserve the public peace;

(12) "signature" or "subscription" includes the mark of a person who cannot write, with the name of that person written near the mark by a witness who writes the

witness's own name near the name of the person who cannot write; but a signature or subscription to a sworn statement only when two witnesses so sign their own names to the sworn statement

9.50.020. Penalty. A person who is guilty of contempt is punishable by fine of not more than $300 or by imprisonment for not more than sex months. However, when the contempt is one mentioned in AS 9.50. 010(3)-(12), or in an action before a magistrate, the perosn is punishable by a fine of not more than $100 unless it appears that a right or remedy of a party to an action or proceeding was defeated or prejudiced by the contempt, in which case the penalty shall be as prescribed for contempts described in AS 9.50.010 (1) and (2).

9.50.030. Jury trial. A person who is charged with contempt of court not committed in the presence of the court, where the act or thing so charged as a contempt is of such nature as to

constitute also a criminal offense under a statute of the United States or a law of this state, has a right to jury trial.

22.15.090. Sessions and general powers of district court

(1) exercise its powers in a criminal action, or in a proceeding of a criminal nature, including the issuance of orders pertaining to bail,

(2) receive a verdict or discharge a jury,

(3) issue writs of habeas corpus,

22.15.100. Functions and powers of district judge and magistrate

Each district judge and magistrate has the power

(1) to issue writs of habeas corpus

(4) issue warrants of arrest, summons and search warrants according to manner and procedure presecibed by law and the supreme court;

(5) to act as an examining judge or magistrate in preliminary examinations in criminal proceedings; to set, receive

and forfeit bail and ato order the releasse of defendants under bail;

(7) of the superior court in all reapects including but not limited to contempts, attendance of witnesses and bench warrants;

22.15.110. Additional duties of district judge and magistrate.

(1) exercise authority of coroner

(2) record birth, death and marriage certificates;

(3) take custody of property of deceased persons

(4) file conveyances to a nonresident alien or for his benefit.

22.15.120. Limitations on proceedings which magistrate may hear.

A magistrate shall preside only in cases and proceedings under AS 22.15.040, 22.15.100, and 22.15.110, and as follows,

(1) for the recovery of money or damages only when the amount claimed, exclusive of costs, interest, and attorney fees,

does not exceed $1,000.

(2) for the recovery of specific personal property when the value of the property claimed and the damages for the detention do not exceed $1,000.

(3) for the recovery of a penalty or forfeitrue, whether giben by statute or arising out of contract, not exceeding $1,000.

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for penalty or forfeiture imposed by statute;

(5) to give judgment of conviction upon a plea of guilty by the defendant in a criminal proceeding within the jurisdiction of the district court'

(6) to hear, try, and enter judgments in all cases involving misdemeanors, if the defendant consents in writing that the magistrate may try the case;

(7) th hear, try and enter judgments in all cases involving infractions under AS 28 and violations of ordinances of political subdivisions;

22.15.150. Jury trials. The trial by jury in the district courts consists of a body of six persons in number.

22.15.195. Approval or rejection. Each district judge is subject to approval or rejection as provided in the Alaska Election Code (AS 15).

28.05.151. Form and issuance of citation. (a) When a person is arrested or cited for the commission of a vehicle or traffic offense which is a misdemeanor or an infraction, the arresting or citing officer..

(e) If the person cited fails to pay the bail amount or appear in court as required, the citation shall be considered a summons as for a charge of a misdemeanor and the person shall be proceeded against in the manner prescribed by law. However,

the maximun penalty which may be imposed for the original offense may not exceed the bail amount for that offense set out in the schedule of bail amounts as determined by the supreme court under (b) of this section.

28.40.050. Penalty for violations of law, regulations, and municipal ordinances.

(a) It is a misdemeanor for a person to violate a provision of this title unless the violation is by this title or other law declared to be a felony or an infraction.

(c) Unless otherwise specified by law a person convicted of a violation of a regulation adopted under this title, or a municipal ordinance regulating vehicles or traffic when the municipal ordianace does not correspond to a provision of this title is guilty of an infraction and is punishable by a fine not to exceed $300.

(d) An infraction, as provided for in (c) of this section, is not considered a criminal offense and may not result in imprisonment, nor is a fine imposed for the commission of an infraction considered a penal or criminal punishment; nor may the commission of a single infraction result in the loss of a driver's license or privilege to drive in this state except as may result from the accumulation of points under AS 28.15.221-29.15.261, or the registration of vehicles; nor does a person cited with an infraction have a right to trial by jury or to court-appointed counsel.

STATEMENT OF THE CASE

Individuals acting under color of state law seized Mr. DeNardo and issued him two traffic citations for:

1. a missing front license plate;

2. failure to yield the right of way.

[R.1] These individuals were required by Art.12,§5 of the Alaska Constitution to subscribe to an oath of office to uphold the Constitutions of the United States and Alaska; before they entered upon their duties as public officers. Subscribed is defined as a signature, or a mark of a person who cannot write; under AS 1.10.060. The individuals acting under color of state law were not police officers because they failed to comply with the state constitution. [R.26, Exhibit A; R.1]

The citations issued Mr. DeNardo were null and void.

Mr. DeNardo's Indigency

Mr. DeNardo was an indigent. At the time of these events, Mr. DeNardo was granted in-forma-pauperis standing by:

1. The United States Supreme Court in case no. 81-5566
2. the Federal District Court in case no. A81-038
3. The Alaska Supreme Court in case no. 5631

Mr. DeNardo was examined under oath by state magistrates Cook and Weilkopolski. Mr. DeNardo testified in proof of his indigency; no contradictory or impeaching evidence was offered. [R.33,p.3;R.1]

Magistrates Incarcerate Mr. DeNardo

Mr. DeNardo made a special appearance to challenge the jurisdiction of the traffic court; because of the void citations. The challenge was denied by the magistrates. Mr. DeNardo was ordered to post a supersedeas cash bond as security

for the statutory civil infraction fine. [R.26,p.2;R.1]

A civil traffic infraction is not a criminal offense; nor is a fine imposed for the commission of an infraction considered a penal or criminal punishment; nor may an infraction result in imprisonment. [Alaska Statute(AS) 28.40.050]

Mr. DeNardo could not post the supersedeas bond because he was an indigent pauper. [R.1]

The magistrates incarcerated Mr. DeNardo on 6 July,1981 and 6 August,1981: the magistrates charged Mr. DeNardo with a misdemeanor for indirect contempt under AS 11.81.900(31); because Mr. DeNardo refused to post a supersedeas bond as security for the fine that could be levied if Mr. DeNardo was found guilty of the civil infraction. [R.29,attachments.]

A magistrate may try a misdemeanor only if the defendant consents in writing,

AS 22.15.120(6); Mr. DeNardo never so consented. A magistrate shall preside only in cases and proceedings under AS 22.15.040, 22.15.100, 22.15.110, and 22.15.120.

A person charged with indirect contempt of court has a right to trial by jury, AS 9.50.030; which Mr. DeNardo demanded. Jury trials are held in the dirstict court under AS 22.15.090 and 22.15.150: magistrates have no authority under those statutes. As an indigent, Mr. DeNardo was entitled to court appointed counsel. Impossibility of performance is a complete defense to the charge of failure to perform under indirect contempt.

Mr. DeNardo Was Not Incarcerated For Failure To Appear

When Mr. DeNardo made a special appearance 6 July,1981; he was scheduled to appear 9 July,1981 for an evidentiary hearing regarding his indigency. Mr.

DeNardo was jailed 6 July,1981 because of inability to perform. [R.1]

When Mr. DeNardo made a special appearance 6 August,1981 he was scheduled to appear 17 August,1981 for an evidentiary hearing regarding his indigency. Mr. DeNardo was jailed 6 August,1981 because of inability to perform. [R.1]

Conditions At The 6th and C Street Jail Violated a State Court Order

The 6th and C street jail was in violation of a superior court order against the conditions existing at the time of Mr. DeNardo's incarceration. [R.1]

Mr. DeNardo was incarcerated in an extremely overcrowded cell; he was not issued bedding; he was not issued toiletries; he was denied a telephone call; he was incarcerated with dangerous felony criminals; the cell was extremely filthy; no food was served. [R.1]

Writ of Prohibition

Mr. DeNardo filed a Writ of Prohibition in the state superior court: The issue was the void citations issued by individuals who had not subscribed to an oath of office required by the Alaska Constitution. The Writ was denied because it was held that police officers were not public officers. [R.29,Exhibit 2; R.1]

Proceedings Below

The district court granted summary judgment to the state magistrates because of absolute judicial immunity: summary judgment was granted to the municipality and its agents under 28 U.S.C. §1738 because of a lower state court decision: a decision rejected by the Supreme Court of the State. [Appendix,35-45]

The NinthCircuit affirmed without opinion. [Appendix,34]

THE FEDERAL QUESTION IS SUBSTANTIAL

I. STATE MAGISTRATES WHOSE ACTS ARE PROHIBITED BY STATUTE, CANNOT CLAIM JUDICIAL IMMUNITY

The issue of immunity is the issue of jurisdiction. The law is a perpetual injunction upon the magistrates. They were specifically prohibited by statute from jailing Mr. DeNardo without Due Process and Equal Protection of the Law under state statutes.

Bradley v. Fisher, is the case relied on by the modern authority of Pierson v. Ray, 386 U.S. 547(1967) and Stump v. Sparkman, 435 U.S. 349(1978).

> "Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible."

Bradley v. Fisher, 80 U.S. 335,351(1871).

A. INCARCERATING AN INDIGENT TO COERCE POSTING A SUPERSEDEAS BOND FOR A CIVIL INFRACTION; CONVERTS THE CIVIL INFRACTION INTO A MISDEMEANOR INDIRECT CONTEMPT

Mr. DeNardo was jailed because he "refused" to perform by posting a supersedeas bond as security for a civil fine: an act he could not perform because of his undisputed indigency.

The statute stated that the civil infraction is not considered a criminal offense; nor is the fine imposed for the commission of an infraction considered a penal or criminal punishment. [AS 28.40.050]

Incarceration to coerce an act impossible of performance converts the original civil infraction into a criminal charge.

Mr. DeNardo was charged with two civil infractions punishable only by a fine under AS 28.40.050(c) & (d). Mr. DeNardo made a special appearance in traffic court to challenge the traffic court's jurisdiction because of void notice. The magistrates demanded a supersedeas as security for the civil fines that could be imposed on a finding of guilt.

Mr. DeNardo proved he was indigent and could not perform. On both special appearances, Mr. DeNardo was jailed for 'refusal' to post a supersedeas. Refusals are contemptuous of judicial authority because they are intentional obstructions of court proceedings. U.S. v. Wilson, 421 U.S. 309,315(1975).

Where confinement cannot accomplish the remedial object sought or where there is no direct remedial objective left to be achieved; any incarceration —— even when designated civil in nature —— takes

on a clearly criminal character. Maggio v. Zeitz, 333 U.S. 56,72(1947); Falstaff Brewing v. Miller Brewing, 702 F.2d 770, 782(9th Cir. 1983); Gwyn v. Gwyn, 530 P.2d 1311,1312,1315(Alaska 1975).

The Alaska Supreme Court holds that an accused is entitled to a jury trial in any criminal prosecution; that a criminal prosecution includes 'any offense or direct penalty for which may be incarceration in a jail or penal institution.' Baker v. City of Fairbanks, 471 P.2d 386,401-402 (Alaska 1970).

A defendant facing contempt and penal incarceration for non-payment of money ordered by the court, is entitled to a jury trial on the issue of his ability to make such payments and his wilful non-compliance. Johansen v. State, 491 P.2d 759,766-767(Alaska 1971).

In Alaska there is no exception to the right to a jury trial when imprisonment is

a potential sanction; even in cases of petty contempts. State v. Browder, 486 P. 2d 925,938(Alaska 1971).

In criminal contempt proceedings, an indigent defendant has a right to court appointed counsel. Otton v. Zaborac, 525 P.2d 537,538(Alaska 1975).

When a criminal contempt is charged, there must be notice and all elements of the offense must be proven beyond a reasonable doubt. Continental Insurance v. Bayless, 548 P.2d 398,403,407(Alaska 1976).

In order for conduct to constitute contempt, it must be wilfull. State v. Browder, supra, at 942-943. Inability to comply is a complete defense to a charge of 'refusing' to obey a court order. U.S. v. Rylander, 714 F.2d 996,1002(9th Cir. 1983); Johansen v. State, 491 P.2d 759,767(Alaska 1971).

The Sixth Amendment mandates: 1) notice as to the nature and cause of the criminal accusation; 2) compulsory process for obtaining witnesses; 3) assistance of counsel.

Notice of the crime of failure of an indigent to perform by tender in discharge would be impossible. The Equal Protection and Due Process Clauses forbid such a crime from existing. Tate v. Short, 401 U.S. 395(1971).

The Eighth and Fourteenth Amendments Impose Substantive Limits on What Can Be Made Criminal and Punished As Such

The substantive limits imposed by the Eighth and Fourteenth Amendments on what can be made criminal and punished as such were discussed in Robinson v. California, 370 U.S. 660(1972). The Court found unconstitutional a state statute that made the status of being addicted to a narcotic drug a criminal offense. It held, in effect that it is 'cruel and unusual' to impose any punishment at all for the mere

status of addiction. The cruelty in the abstract of the actual sentence imposed was irrelevant: 'Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.' id. at 667.

Mr. DeNardo's "crime" was in being poor. He could not pay in substance b ecause none could be found: as an insolvent he could not tender the promise as indorser because that would be fraud upon the holder in due course: nor could he, as an indigent, act as a surety because the law cannot compel a fraud.

The magistrates conditioned Mr. DeNardo's right to liberty upon the forfeiture of his rights under the Equal Protection and Due Process Clauses. Mr. DeNardo was indigent and could not perform by tender in discharge: Tender in discharge of debt the only liability under the statute, AS 28.40.050.

Contempt for 'refusal' to perform is punishable by imprisonment only if the defendant can perform; AS 9.50.050: whether he can or not is to be determined by trial to the jury; which a magistrate cannot conduct.

The statute declares that the debtor's body is not liable to be taken upon execution. It is a reproach to the Constitutional guarantees of personal liberty to subject a citizen's body to arrest and imprisonment for debt; before it can be ascertained whether judgment will be rendered against him: in cases where by law his body cannot be taken in execution of that judgment without trial by jury on the fact of ability to perform.

The statutes the magistrates acted under, AS 28.05.151 and 28.40.050, are repugnant to the Due Process and Equal Protection Clauses.

B. STATE MAGISTRATES HAVE STATUTORILY LIMITED JURISDICTION; THEY CANNOT CONDUCT MISDEMEANOR JURY TRIALS

A magistrate is purely a creature of statute; the holder of a statutory office separate and distinct from the elective office of judge. [AS 22.15.195] A magistrate presides over a court of limited jurisdiction prescribed by law. Buckalew v. Holloway, 604 P.2d 240.243 (Alaska 1979).

Magistrates have contempt powers subject to statutory jurisdictional requirements. A contempt before a magistrate is punishable by a fine of $100.00. [AS 9.50.020] They cannot incarcerate anyone unless there is violence or breach of the peace in the courtroom: Mr. DeNardo was not charged under either specification.

Mr. DeNardo was charged with a misdemeanor indirect contempt because he failed to comply with the court's

order to post a supersedeas.

A magistrate may try a misdemeanor if the defendant consents in writing [AS 22.15.120]: Mr. DeNardo did not consent to a trial before the magistrates.

The misdemeanor indirect contempt contained the issue of wilfullness. Mr. DeNardo's defense was that he could not comply. Continental Insurance v. Bayless, supra, at 403. Mr. DeNardo was entitled to a jury trial under the contempt statute AS 9.50.030: Mr. DeNardo demanded a trial by jury: The trial by jury was denied.

Jury trials in the district court are conducted under AS 22.15.090 and 22.15.150; and are held before an elected district judge. Magistrates are specifically excluded from conducting jury trials. [AS 22.15.120]

The law is a perpetual injunction upon the judge when he is called upon

to exert judicial power. The question of a court's jurisdiction goes to its power to hear and adjudicate the subject matter in a given case. Matter of C.D.M., 627 P.2d 607,610(Alaska 1981).

Legislative enactments restricting the contempt power are binding on the legislative courts. The authority of the magistrate in the district court is limited by statute because the district court is a legislative court. Continental Insurance v. Bayles, supra, at 410.

A court's authority to punish or coerce compliance is limited by statute and the requirements of Due Process. United States v. Abascal, 509 F.2d 752(9th Cir.); cert.den. 422 U.S. 1027.

A court must have cognizance of the class of cases to which the one to be adjudged belongs before it has jurisdiction. Reynolds v. Stockton, 140 U.S. 254,268(1890).

SUMMARY: The magistrates did not have jurisdiction to try Mr. DeNardo for a criminal contempt by summary process. The Fourteenth Amendment guaranteed Mr. DeNardo Due Process as defined by the state statutes: Trial by jury before an elected district judge.

The magistrates' absolute lack of jurisdiction subjects them to liability under the Civil Rights Act.

II. A CIVIL RIGHTS ACTION CANNOT BE BARRED UNDER 28 U.S.C. §1738 BY A LOWER COURT DECISION REJECTED BY THE STATE'S SUPREME COURT

Erie Railroad requires federal courts to apply the case decisions of the state's highest authority; in this case the Alaska Supreme Court. The Alaska Supreme Court has ruled that police officers are public officers: The lower state court decision that police officers are not public officers is rejected by the state's final appellate authority.

The Alaska Supreme Court's decisions agree with the United Stupreme Court's decision in Foley v. Connelie, 435 U.S. 291,297-299(1978)---police officers are public officers. Larson v. State, 564 P.2d 365,369(Alaska 1977); Lee v. State, 490 P.2d 1206,1209-1210(Alaska 1971).

The Alaska Statutes define police officer as a public officer:

AS 1.10.060(6)-"peace officer" means any officer of the state troopers, members of the police force of any incorporated city or borough, United States marshalls and their deputies, and other officers whose duty it is to enforce and preserve the public peace;

AS 11.81.900(38)-"peace officer" means a public servant vested by law with a duty to maintain public order or to made arrests, whether the duty extends to all offenses or is limited to a specific class of offenses or offenders;

AS 11.81.900(48)-"public servant" means (A) an officer or employee of the state, a municipality or other political subdivision of the state , or a governmental instrumentality of the state, including legislators, members of the judiciary, and peace officers;

AS 18.65.290(2)-"police officer" means a full-time employee of the state or a

local police department with the authority to arrest and issue citations; detain a person taken into custody until that person can be arraigned before a judge or magistrate; conduct investigations of violations of or enforce criminal laws, regulations and traffic laws; search with or without a warrant persons, dwellings, and other forms of property for evidence of a crime; carry a concealed weapon and take other action consistent with exercise of these enumerated powers when necessary to maintain the public peace.

The Alaska Attorney General has issued two opinions defining police officers to be public officers. [R.26,Exhibit B; R.40, Exhibit B]

The federal district court applied the wrong state decisional authority under 28 U.S.C. §1738; and the Ninth Circuit affirmed that error.

The defendants admit that public officers must comply with the oath requirement of the Alaska Constitution: It is admitted that the municipal police officers did not comply: Therefore it is admitted that Mr. DeNardo has stated a cause of action under the Civil Rights Act for acts done under color of state law.

III. THE FAILURE TO COMPLY WITH STATE STATUTORY NOTICE REQUIREMENTS DENIES DUE PROCESS

Alaska Statute 28.05.151 requires traffic citations be issued by police officers who have taken the oath of office required by the Alaska Constitution The municipal agents never subscribed to the oath of office. Mr. DeNardo was not served under the statute.

Mr. DeNardo must be given statutory notice or there is a denial of Due Process. Galpin v. Page, 18 Wall 350, 368; Hovey v. Elliott, 167 U.S. 409; Windsor v. McVeigh, 93 U.S. 274,277.

CONCLUSION: The undisputed substantive facts and statutory judicial facts, argue for the jurisdiction of the United States Supreme Court under 28 U.S.C. §1257(2) or §1254.

RESPECTFULLY SUBMITTED this 31 day of October, 1985.

Daniel R. DeNardo

Daniel R. DeNardo

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL R. DE NARDO,

Plaintiff/Appellant,

VS.

WILLIAM COOK, et al.,

Defendants/Appellees.

NO. 84-4252

D.C. NO. A83-339

ORDER

AUG. 12,1985.

Appeal from the United States District Court
for the District of Alaska
Honorable James M. Fitzgerald

Argued and Submitted: August 7,1985

Before: WRIGHT, POOLE, and HALL,
Circuit Judges

The order of the district court granting summary judgment in favor of the defendants-appellees is AFFIRMED. We agree with the rationale of Judge Fitzgerald as set forth in his Memorandum and Order of August 30, 1984.

The mandate will issue immediately. no petition for rehearing will be entertained.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

DANIEL R. DE NARDO,

Plaintiff,

vs.

WILLIAM COOK, et al.,

Defendants.

NO. A83-339

MEMORANDUM AND ORDER

These motions to dismiss and for summary judgment areise in a civil rights action brought under 42 U.S.C. §1983 by Daniel DeNardo against the Municipality of Anchorage, the Municipality's police chief, five Municipality police officers, two Alaska state magistrates. DeNardo cliams that the municipal police officers violated his constitutional rights by issuing him four traffic citations bwtween January 25,1981 and March 25,1981, because at the time, none of the officers had taken the oath of office which DeNardo claims was

required under Article 12, Section 5 of the Alaska Constitution. Plaintiff's Complaint, July 6,1983, ¶¶ 11=12, 14-15, 23. DeNardo claims that the defendant state magistrates violated his rights by ordering him to be incarcerated for failure to post bail for his alleged traffic violations, even though he was indigent. Plaintiff's Complaint, ¶¶ 4-10,21,24. DeNardo also seeks to require the the return of any fingerprints or pictures taken of him. During oral argument on May 21,1984, I granted Summary Judgment for the magistrates based on principles of judicial immunity. Stump v. Sparkman, 435 U.S. 349,355-357 (1978)(state judges immune from liability for damages under 42 U.S.C. §1983). This order repersents a final judgment on DeNardo's cliams against these two sets of defendants. I now GRANT the municipal defendants' motion for summary judgment on

all of DeNardo's claims.

DeNardo's claims against the municipal defendants are all premised upon his contention that the municipal police officers; failure to take the oath prescribed in Article 12, Section 5 of the Alaska Constitution violated state law. He maintains that this alleged violation of the Alaska Constitution is the basis of all his fedreal constitutional claims against the municipal defendants, and is therefore the basis of all his 1983 claims against them. DeNardo Deposition, pp. 30-44, quoted in part in Municipal Defendants' Memorandum, pp. 3-5; Plaintiff's answers to interrogatories 5,8,9,10,14.

Yet DeNardo raised this precise claim concerning Alaska's oath requirement in the state courts during the pendency of his traffic court case, when he filed an emergency application for a writ of prohibition with the Alaska Superior

Court, October 14,1982. DeNardo claimed at that time that the issuance to him of the four traffic citations by municipal police officers who had failed to satisfy the Alaska Constitution's oath requirement had violated his rights under the United States Constitution. The Superior Court heard oral argument on DeNardo's claim on December 22,1982, and expressly rejected the claim when it denied DeNardo's writ. The Superior Court ruled that under Alaska law, a municipal officer "is a full - time public employee under provisions of AS 18.65.290, and is not a public officer within the context of Alaska Constitution Article XII §5," and therefore not subject to that provision's oath requirement. As a result, the Cuperior Court rejected DeNardo's claim that the issuance of the four citations to him by the municipal police officers had violated his federal constitutional rights.

The municipal defendants contend that in light of this ruling by the Alaska Superior Court, DeNardo's entire 1983 action is barred under the principles of res judicata and, more specifically, collateral estoppel. Migra v. Warren City School District, 104 S.Ct. 892,894 (1984). I agree.

Under the principles of collateral estoppel, as empodied in 28 U.S.C. §1738, issues actually litigated in s state court proceeding are entitled to the same preslusive effect in a subsequent federal 1983 suit as they enjoy in the courts of the state where the jucgment was rendered. Allen v. McCurry, 449 U.S. 90,96-99(1980). This principle applies even when the issues envolved were originally raised by a party as a defendant in a state criminal or quasi=criminal action, who then subsequently seeks to relitigate them as a plaintiff in a 1983 action.

As a result, DeNardo is precluded from raising any constitutional claims against the municipal defendants in his present 1983 action that have previously been decided against him in his state traffic court action, as lang as the prior state decisions against him would be given collateral estoppel effect under Alaska law.Alaska's law of collateral estoppel provides that once a valid, final judgment has been entered in an action, the parties are precluded from attempting to relitigate any "matters that were neceaaarily litigated and determined although the claim or demand in their subsequent action is different." Calhoun v. Greening, 636 P.2d 69,71-72 (Ak. 1981). The Alaska state courts have entered final judgment in DeNardo's traffic court action. DeNardo's claim that the issuance of the four traffic citations to him violated his federal constitutuional rights based upon Alaska's oath requirement

was necessarily litigated in that action and expressly rejected by the Superior Court. Therefore, I conclude that the Alaska courts would give collateral estoppel effect to this determination by the Alaska Superior Court.

As a result, under 28 U.S.C. §1738, I must give collateral estoppel effect to the Superior Court's determination rejecting DeNardo's constitutional claims. Migra v Warren School District, 104 S.Ct. at 897. DeNardo is therefore precluded from relitigating these claims in the present action. I must accept, for the purposes of this action, the conclusions of the Superior Court that the defendant municipal police officers were not required under Alaska law to take the oath prescribed in Article 12, §5 of the Alaska Constitution, and that they therefore did not violate DeNardo's federal constitutional rights when they issued

him the four challenged citations. Since DeNardo has indicated that his entire §1983 action is based upon the failure of these officers to take the proper oath, I must grant summary judgment on all his claims against the municipal defendants.

However, DeNardo argues that I chould not give collateral estoppel effect to the Superior Court's prior decision on the grounds that the decision is void because it was "contrary to the law" and the evidence in his case. I cannot agree. For DeNardo to establish that the Superior Court's decision is void and therefore subject to collateral attack in this court, he must demonstrate that one of several specific conditions existed at the superior court level. Since he has failed to make this showing, I cannot accept his claim that the decision is void.

Although Alaska courts have not

precisely defined what constitutes a "void" decision specifically for res judicata purposes, it has been held that decisions are void for purposes of a motion to reconsicer only "if the court that rendered those decisions lacked personal jurisdiction over the defendant, or if it acted in a manner inconsistent with due process of law," such as failing to provide litigants with notice or an opportunity to be heard. Aguchak v. Montgomery Ward, 520 P.2d 1352,1354(Ak 1974), Pew v. Foster, 660 P.2d 447,559(Ak 1983). Moreover, the Alaska courts have placed the burden of establishing either lack of personal jurisdiction or a violation of due process upon the party asserting that a prior decision was void. Aguchak v. Montgomery Ward, 520 P.2d at 1354.

In light of these authorities, I cannot conclude that the Superior Court's determination concerning DeNardo's

constitutional claims is void. DeNardo asserts in a conclusory manner that the Alaska courts lacked personal jurisdiction over him furing his traffic court action. However, he has not cited any authority to indicate that the Alaaka courts failed to acquire personal jurisdiction over him when he was issued the four challenged traffic ditations and was required to appear in court. Moreover, DeNardo does not contend that the Alaska courts lacked subject matter jurisdiction over his traffic court action, that htere were indispensable parties whom he was unable to join in that action, or that any fraud or misrepresentation occurred during that action. Finally, I conclude, based upon the record before me, that DeNardo was provided a full and fair opportunity to present his constututional claims based upon Alaska's oath requirement to the Superior Court. For these reasons

I conclude that DeNardo has failed to demonstrate that the Superior Court's rejection of his constitutional claims is void and therefore subject to collateral attack.

DeNardo's claim that the Alaska Superior Court;s determination was " contrary to the law" and to the evidence is nothing more than a claim that the Court's decision was erroneous. Even if DeNardo is correct, he has not cited any tufhority to indicate that an erronieous decision does not receive res judicata or collateral estoppel effect under Alaska law.

For these reasons, I conclude that plaintiff DeNardo cannot prevail on his §1983 claims against the municipal defendants. I GRANT the municipal defendants' Motion for Summary Judgment on all of DeNardo's claims.

ORDERED ACCORDINGLY.

Dated at Anchorage, Alaska, this 3rd day of August, 1984.

James M. Fitzgerald
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

DANIEL R. DE NARDO,
Plaintiff,
VS.
WILLIAM COOK et al.,
Defendants.

[FILED OCTOBER 11, 1984]

CASE NO.
A83-339

NOTICE OF APPEAL

Notice is hereby given that Daniel R. DeNardo, plaintiff, appeals to the U.S. Court of Appeals for the Ninth Circuit from the final judgment entered 12 September,1984.

RESPECTFULLY SUBMITTED this 11th day of October,1984.

Daniel R. DeNardo